Need to know: consent and the nurse's duty to warn of risk

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In last month's article, we outlined the requirements for valid or real consent from a patient before any examination or treatment can occur (Re MB (Caesarean Section) [1997]). To be real, in law, the consent must be full, given voluntarily, and based on sufficient information to allow a capable patient to make a balanced judgement about whether to accept or refuse treatment (Chatterton v Gerson [1981]). This article considers the district nurse's duty to give information on treatment to patients when obtaining consent, and the extent to which that duty includes a requirement to warn patients of any risks inherent in the treatment being proposed.

A duty to give information

District nurses owe a duty of care to their patients (Gold v Haringey HA [1998]). This duty was described by Lord Diplock as:

> *'A single comprehensive duty covering all the ways in which you are called on to exercise skill and judgement in the improvement of the physical and mental condition of the patient.' (Sidaway v Bethlem Royal Hospital [1985])*

Part of a district nurse's duty of care is to give advice and information to a patient so that they understand the nature of the treatment and can make a choice (Hills v Potter [1983]). Courts do not distinguish between advice given in a therapeutic and non-therapeutic context (Gold v Haringey HA [1988]).

The basis of the duty to give information is derived from two areas of law; the law of trespass and the law of negligence.

Trespass to the person

Regarding trespass to the person, a real or effective consent only requires the district nurse to explain in broad terms the nature of the treatment to the patient. The information threshold for the law of trespass is low. As long as the broad nature of the touching has been explained – for example, 'I am going to give you an injection for the pain' – then no cause of action in trespass will arise.

In Chatterton v Gerson [1981], a woman alleged that, as a surgeon had failed to warn her of the risks inherent in the surgery she required, a real consent had not been obtained and so a trespass had occurred. The court held that once the patient is informed in broad terms of the nature of the procedure and gives consent, that consent is real, and the cause on which to base a claim for failure to go into risks and implications is negligence. Trespass only arises where there has been no consent, where a different procedure is carried out to that which the patient had consented to, or where consent has been obtained by fraud. This is what happened in Potts v NWRHA [1983], where a patient successfully sued for trespass when she was led to believe that she was having a routine post-natal vaccination. In fact, she was given the long-acting contraceptive depo-provera.

If a district nurse gives misinformation or false information to a patient, then any consent given will be negatived, and liability in trespass will arise.

Negligence

As well as explaining the procedure in broad terms, district nurses are also required to warn patients of the risks inherent in treatment. The cause of action for failing to warn a patient of treatment risks lies in negligence, as the courts consider the district nurse to have failed in her duty of care to the patient.

What information to give a patient about the risks of treatment needs to be given careful consideration, and requires the district nurse to negotiate a two-edged sword. One the one side, they have a duty to inform the patient of the risks of a proposed treatment, and on the other they have a duty not to disclose information if a patient would be frightened if told all risks, and the likelihood of occurrence was very small (Sidaway v Bethlem Royal Hospital [1985]).

ABSTRACT

This article, the second in a series on consent to examination and treatment, considers a district nurse's duty to warn patients of the risks inherent in treatment. The article discusses whether patients are entitled to full and honest answers to their questions about risks, and whether district nurses can lie to anxious patients about the risks of treatment.

KEY WORDS

Consent • Duty to warn • Negligence • Patient information

In Goorkani v Tayside Health Board [1991], a doctor was found negligent for failing to tell a patient of the 95% risk of irreversible infertility at the time of prescribing chlorambucil for Behcet's disease when used over a long period of time.

In Pearce v United Bristol Healthcare NHS Trust [1999], a woman sued in negligence after her baby was delivered stillborn. The woman saw her consultant when she was 14 days beyond term and pleaded for a Caesarean section or for the birth to be induced. The consultant advised a natural birth, but 7 days later the baby was found not to be viable and she was induced stillborn. She argued that the consultant had failed in his duty to inform her of the risk of stillbirth, and that had she been informed she would have insisted on a Caesarean section. The court held that if there had been a significant risk, of the order of 10%, then it was the duty of the doctor to inform the patient so that she could make an informed decision. However, here the risk was 0.2%, and given the woman's distressed condition, the consultant was right not to inform her of the minor risk of non-intervention.

How much information to disclose

The standard expected of a district nurse when warning a patient was considered by the House of Lords in Sidaway v Bethlem Royal Hospital [1985]. In this case, a woman underwent surgery for persistent pain which carried a very small risk of damage to the spine, even if performed properly. This risk occurred and the woman suffered severe injuries. She claimed she had not been warned of the risk, and would not have consented to the surgery had she been told.

Their Lordships held that the surgeon had acted in accordance with the general standard of care in healthcare called the Bolam test (Bolam v Friern HMC [1957]). That is, the surgeon had acted in accordance with a practice accepted by a respected body of fellow professionals and there was no negligence. The risk of nerve damage was less than 1%, and it was accepted practice not to tell the patient so as not to alarm them.

The amount and quality of information to be given to a patient about risks is therefore generally based on the professional standard of care. In reaching a decision on what information to disclose about risks, the district nurse is required to consider the:

- Characteristics of the patient in terms of their anxiety, intelligence and level of understanding
- Questions asked by the patient about the treatment
- Nature of the treatment
- Risks of treatment
- Likelihood of the risk occurring
- Severity of harm if the risk occurred
- Accepted practice in what risks to disclose to the patient.

The characteristics of the patient

The House of Lords in Sidaway recognized that, while warning of risk information was essential to allow a patient to make a balanced judgement about accepting or refusing treatment, giving too much technical information about the treatment would be likely to frighten patients and put them off having the treatment they need. Their Lordships were of the view that health professionals should not only consider carefully what risk information to disclose, but that their duty of care demanded that such information was explained in terms the patient was likely to understand.

When discussing risks and deciding what information to disclose, a district nurse must take into account the characteristics of the patient. More anxious patients will generally be given less comprehensive information than those with a more relaxed attitude to treatment. When the duty to warn of risks was first considered by the courts, they accepted it might be necessary to lie to very anxious patients about the risks of treatment to ensure they were calm (Hatcher v Black [1954]). The House of Lords in Sidaway have made it clear that, while it is necessary to withhold certain risk information from patients, it can never be right to lie to a patient.

The questions asked by patients

The level of information a district nurse discloses to a patient about the risks inherent in treatment also depends on the questions asked by the patient. Where a patient asks no questions, then it is entirely for the district nurse to determine what information to give based on the requirements of their duty of care and the characteristics of the patient. Even where patients make general enquiries about the risk of treatment, the district nurse is still not required to tell the patient about every possible risk.

The issue of how much information a district nurse should give in response to a general enquiry about risks was considered by the Court of Appeal in Blyth v Bloomsbury HA [1993]. Mrs Blyth sued when she suffered side effects from the contraceptive depo-provera. Despite asking general questions about the risks, she was not told about all the side effects of that drug. The Court of Appeal held that what a patient should be told in answer to a general enquiry about risks should be the same as when a patient asked no questions at all. In both cases, the answer depends on the circumstances, the nature of the enquiry, the nature of the information which is available (i.e. its reliability and relevance), the condition of the patient, and so forth.

No patient is, therefore, entitled to a truly full and honest answer in response to a general inquiry. The district nurse only has to answer as fully as a respected body of their peers would have answered in those same circumstances. The situation is very different, however, when a patient asks a specific question about a particular risk. Here, a different standard of care applies for the patient, and the district nurse is required to give a full and honest answer to the patient, regardless of how small or trivial the risk.

The House of Lords in Sidaway v Bethlem Royal Hospital [1985] held that:

> *'If the patient manifested the attitude of wishing to be informed of any risk by means of questioning, the [health professional] would tell him whatever it was the patient wanted to know.'*

Therefore, when a specific question is asked about risks, district nurses are required to follow this ruling. They are required to give a full and honest answer.

In Chester v Afshar [2002], a woman saw a surgeon because of a troublesome back complaint. She asked specific questions about the risks of the recommended surgery and made it clear that she would not have the operation if there was a chance she would be paralysed. Even though the operation was competently performed, root damage resulting in paralysis occurred. The risk of nerve root damage was very rare, and was estimated at less than 1%. The patient argued she should have been told.

The Court of Appeal held that, in light of the questions she had asked, she should have been given a full and honest answer about even remote risks and so should have been told about the slim possibility of damage to the nerve root. As the patient had specifically asked about risks and had not been given adequate advice, the doctor was found to be negligent.

When responding to specific questioning from a patient about risks inherent in treatment, district nurses must answer fully and truthfully, regardless of the likelihood of the risk materializing.

Likelihood of the risk occurring

It has been seen that district nurses are required make a determination of what risks to warn patients about when seeking consent to treatment. The courts generally view a risk of some 10% or greater as falling into the zone of disclosure. Even here, however, where the risk has only minor adverse consequences, it could be withheld if the patient was particularly anxious about the treatment.

Risk of grave adverse consequences

In the rare situations where there is even a small risk of grave adverse consequences, a patient must be told of the risk. This requirement arises where the disclosure of the risk was so obviously necessary to a patient making a balanced choice about treatment that no reasonable or prudent health professional would fail to tell the patient (Sidaway v Bethlem Royal Hospital [1985]).

In Smith v Tunbridge Wells Health Authority [1994], a failure to warn of the risk of impotence from an ivalon sponge rectopexy operation led to a finding of negligence, as any man would want to know about such a grave risk, regardless of how small the chance of it occurring. Similarly, in the case of McAllister v Lewisham and North Southwark Health Authority [1994], a failure to warn of an array of risks arising from surgery on a large arterial-vascular brain malformation also resulted in a finding of negligence.

Recording risk information

Discussions between a district nurse and patient about the treatment being proposed, and any risks inherent in that treatment, often occur on a one-to-one basis with no witnesses to the event. It is essential, therefore, that district nurses carefully document the discussions with patients to corroborate their actions, and those records must include risk information.

In McLennan v Newcastle HA [1992], a patient claimed she had not been told of the relatively high risks associated with her operation. The surgeon, however, had written clear and detailed notes at the time that the risks were explained and understood by the patient. This contemporaneous record persuaded the judge that the patient had been told about the risks, and the case failed. The McLennan case illustrated the importance of contemporaneous recording of discussions with patients in protecting district nurses from litigation.

Conclusion

The law is clear that the district nurse's duty of care extends to warning patients about the risks inherent in treatment. The type and amount of information depends on the characteristics and inquisitiveness of the patient and the likelihood and severity of the risk.

Generally, the standard of disclosure is based on the principles set out in Bolam v Friern HMC [1957] – the Bolam principle. In line with this principle, district nurses are expected to act in accordance with a practice accepted by a responsible body of professionals. However, where there is even a small risk of a catastrophic outcome then a patient is entitled to be told about that risk.

Where a patient asks specific questions about risks, then the district nurse is required to give a full and honest answer, regardless of the significance of the risk or general view of the profession.

As best practice and in order to protect themselves from litigation, community nurses must ensure they record the patient's general demeanour, level of enquiry and the information given on risks. This should be done as soon as practicably possible, and must include all relevant and factual information. **BJCN**

LEARNING POINTS

- A district nurse's duty of care includes warning patients of the risks inherent in treatment
- This duty requires the disclosure of material risks and a withholding of irrelevant or trivial risk information
- The standard of disclosure is based on the Bolam test, and assessed according to what a respected body of your peers would have said
- A risk of grave consequences must be disclosed to patients
- Patients who ask for information about specific risks are entitled to full and honest answers